

THE HONORABLE THOMAS S. ZILLY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SMACK APPAREL COMPANY,

Plaintiff,

v.

SEATTLE HOCKEY PARTNERS, LLC
d/b/a SEATTLE KRAKEN; NHL
ENTERPRISES, L.P.; and NATIONAL
HOCKEY LEAGUE,

Defendants.

SEATTLE HOCKEY PARTNERS LLC d/b/a
SEATTLE KRAKEN; NHL ENTERPRISES,
L.P.; and NATIONAL HOCKEY LEAGUE,

Counterclaim-Plaintiffs

v.

SMACK APPAREL COMPANY,

Counterclaim-Defendant.

C22-44 TSZ

**STIPULATED
PROTECTIVE ORDER**

1. PURPOSES AND LIMITATIONS

Discovery in this action is likely to involve production of confidential, proprietary, or private information for which special protection may be warranted. Accordingly, the parties hereby stipulate to and petition the court to enter the following Stipulated Protective Order. The parties acknowledge that this agreement is consistent with LCR 26(c). It does not confer blanket

1 protection on all disclosures or responses to discovery, the protection it affords from public
2 disclosure and use extends only to the limited information or items that are entitled to confidential
3 treatment under the applicable legal principles, and it does not presumptively entitle parties to file
4 confidential information under seal.

5 2. “CONFIDENTIAL” AND “HIGHLY CONFIDENTIAL-ATTORNEYS’ EYES ONLY”
6 MATERIAL

7 “Confidential” material shall include documents and tangible things produced or otherwise
8 exchanged that a disclosing party believes in good faith are not generally known to others, and
9 which the disclosing party (i) would not normally reveal to third parties except in confidence or
10 has undertaken with others to maintain in confidence, or (ii) believes in good faith is protected by
11 a right to privacy under federal or state law or any other applicable privilege or right related to
12 confidentiality or privacy.

13 “Highly Confidential-Attorneys’ Eyes Only” material shall include documents and
14 tangible things that contain competitive or commercially sensitive information (including but not
15 limited to non-public information concerning marketing or competitive research), the disclosure
16 of which will result in competitive or commercial harm if disclosed to persons other than those
17 authorized to view “Highly Confidential-Attorneys’ Eyes Only” materials pursuant to this
18 Protective Order.

19 3. SCOPE

20 The protections conferred by this agreement cover not only confidential material (as
21 defined above), but also (1) any information copied or extracted from confidential material; (2) all
22 copies, excerpts, summaries, or compilations of confidential material; and (3) any testimony,
23 conversations, or presentations by parties or their counsel that might reveal confidential material.

24 However, the protections conferred by this agreement do not cover information that is in
25 the public domain or becomes part of the public domain through trial or otherwise.

1 4. ACCESS TO AND USE OF CONFIDENTIAL MATERIAL

2 4.1 Basic Principles. A receiving party may use confidential material that is disclosed
3 or produced by another party or by a non-party in connection with this case only for prosecuting,
4 defending, or attempting to settle this litigation. Confidential material may be disclosed only to the
5 categories of persons and under the conditions described in this agreement. Confidential material
6 must be stored and maintained by a receiving party at a location and in a secure manner that ensures
7 that access is limited to the persons authorized under this agreement.

8 4.2 Disclosure of “CONFIDENTIAL” Information or Items. Unless otherwise ordered
9 by the court or permitted in writing by the designating party, a receiving party may disclose
10 material designated as “CONFIDENTIAL” only to:

11 (a) the receiving party’s outside counsel of record in this action, as well as
12 employees of counsel to whom it is reasonably necessary to disclose the information for this
13 litigation;

14 (b) the officers, directors, and employees (including in house counsel) of the
15 receiving party to whom disclosure is reasonably necessary for this litigation;

16 (c) experts and consultants to whom disclosure is reasonably necessary for this
17 litigation and who have signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A);

18 (d) the court, court personnel, and court reporters and their staff;

19 (e) copy or imaging services retained by counsel to assist in the duplication of
20 confidential material, provided that counsel for the party retaining the copy or imaging service
21 instructs the service not to disclose any confidential material to third parties and to immediately
22 return all originals and copies of any confidential material;

23 (f) during their depositions, witnesses in the action to whom disclosure is
24 reasonably necessary and who have signed the “Acknowledgment and Agreement to Be Bound”
25 (Exhibit A), unless otherwise agreed by the designating party or ordered by the court. Pages of
26 transcribed deposition testimony or exhibits to depositions that reveal confidential material must

1 be separately bound by the court reporter and may not be disclosed to anyone except as permitted
2 under this agreement;

3 (g) the author or recipient of a document containing the information or a
4 custodian or other person who otherwise possessed or knew the information.

5 4.3 Disclosure of “HIGHLY CONFIDENTIAL-ATTORNEYS’ EYES ONLY”
6 Information or Items. Unless otherwise ordered by the court or permitted in writing by the
7 designating party, a receiving party may disclose any material designated as “HIGHLY
8 CONFIDENTIAL-ATTORNEYS’ EYES ONLY” only to the persons identified in Subparagraphs
9 4.2(a), (c), (d), (e), and (g), and to in house counsel for each party who, prior to receipt of any
10 “HIGHLY CONFIDENTIAL-ATTORNEYS’ EYES ONLY” materials, shall sign the
11 “Acknowledgment and Agreement to Be Bound” (Exhibit A).

12 4.4 Filing Confidential Material. Before filing confidential material or discussing or
13 referencing such material in court filings, the filing party shall confer with the designating party,
14 in accordance with Local Civil Rule 5(g)(3)(A), to determine whether the designating party will
15 remove the confidential designation, whether the document can be redacted, or whether a motion
16 to seal or stipulation and proposed order is warranted. During the meet and confer process, the
17 designating party must identify the basis for sealing the specific confidential information at issue,
18 and the filing party shall include this basis in its motion to seal, along with any objection to sealing
19 the information at issue. Local Civil Rule 5(g) sets forth the procedures that must be followed and
20 the standards that will be applied when a party seeks permission from the court to file material
21 under seal. A party who seeks to maintain the confidentiality of its information must satisfy the
22 requirements of Local Civil Rule 5(g)(3)(B), even if it is not the party filing the motion to seal.
23 Failure to satisfy this requirement will result in the motion to seal being denied, in accordance with
24 the strong presumption of public access to the Court’s files.

1 5. DESIGNATING PROTECTED MATERIAL

2 5.1 Exercise of Restraint and Care in Designating Material for Protection. Each party
3 or non-party that designates information or items for protection under this agreement must take
4 care to limit any such designation to specific material that qualifies under the appropriate
5 standards. The designating party must designate for protection only those parts of material,
6 documents, items, or oral or written communications that qualify, so that other portions of the
7 material, documents, items, or communications for which protection is not warranted are not swept
8 unjustifiably within the ambit of this agreement.

9 Mass, indiscriminate, or routinized designations are prohibited. Designations that are
10 shown to be clearly unjustified or that have been made for an improper purpose (*e.g.*, to
11 unnecessarily encumber or delay the case development process or to impose unnecessary expenses
12 and burdens on other parties) expose the designating party to sanctions.

13 If it comes to a designating party's attention that information or items that it designated for
14 protection do not qualify for protection, the designating party must promptly notify all other parties
15 that it is withdrawing the mistaken designation.

16 5.2 Manner and Timing of Designations. Except as otherwise provided in this
17 agreement (see, *e.g.*, second paragraph of section 5.2(b) below), or as otherwise stipulated or
18 ordered, disclosure or discovery material that qualifies for protection under this agreement must
19 be clearly so designated before or when the material is disclosed or produced.

20 (a) Information in documentary form: (*e.g.*, paper or electronic documents and
21 deposition exhibits, but excluding transcripts of depositions or other pretrial or trial proceedings),
22 the designating party must affix the word "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL-
23 ATTORNEYS' EYES ONLY" to each page that contains confidential material. If only a portion
24 or portions of the material on a page qualifies for protection, the producing party also must clearly
25 identify the protected portion(s) (*e.g.*, by making appropriate markings in the margins).

1 (b) Testimony given in deposition or in other pretrial proceedings: the parties
2 and any participating non-parties must identify on the record, during the deposition or other pretrial
3 proceeding, all protected testimony, without prejudice to their right to so designate other testimony
4 after reviewing the transcript. Any party or non-party may, within fifteen days after receiving the
5 transcript of the deposition or other pretrial proceeding, designate portions of the transcript, or
6 exhibits thereto, as confidential. If a party or non-party desires to protect confidential information
7 at trial, the issue should be addressed during the pre-trial conference.

8 (c) Other tangible items: the producing party must affix in a prominent place
9 on the exterior of the container or containers in which the information or item is stored the word
10 “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL-ATTORNEYS’ EYES ONLY.” If only a
11 portion or portions of the information or item warrant protection, the producing party, to the extent
12 practicable, shall identify the protected portion(s).

13 5.3 Inadvertent Failures to Designate. If timely corrected, an inadvertent failure to
14 designate qualified information or items does not, standing alone, waive the designating party’s
15 right to secure protection under this agreement for such material. Upon timely correction of a
16 designation, the receiving party must make reasonable efforts to ensure that the material is treated
17 in accordance with the provisions of this agreement.

18 6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

19 6.1 Timing of Challenges. Any party or non-party may challenge a designation of
20 confidentiality at any time. Unless a prompt challenge to a designating party’s confidentiality
21 designation is necessary to avoid foreseeable, substantial unfairness, unnecessary economic
22 burdens, or a significant disruption or delay of the litigation, a party does not waive its right to
23 challenge a confidentiality designation by electing not to mount a challenge promptly after the
24 original designation is disclosed.

25 6.2 Meet and Confer. The parties must make every attempt to resolve any dispute
26 regarding confidential designations without court involvement. Any motion regarding confidential

designations or for a protective order must include a certification, in the motion or in a declaration or affidavit, that the movant has engaged in a good faith meet and confer conference with other affected parties in an effort to resolve the dispute without court action. The certification must list the date, manner, and participants to the conference. A good faith effort to confer requires a face-to-face meeting or a telephone conference.

6.3 Judicial Intervention. If the parties cannot resolve a challenge without court intervention, the designating party may file and serve a motion to retain confidentiality under Local Civil Rule 7 (and in compliance with Local Civil Rule 5(g), if applicable). The burden of persuasion in any such motion shall be on the designating party. Frivolous challenges, and those made for an improper purpose (*e.g.*, to harass or impose unnecessary expenses and burdens on other parties) may expose the challenging party to sanctions. All parties shall continue to maintain the material in question as confidential until the court rules on the challenge.

7. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN OTHER LITIGATION

If a party is served with a subpoena or a court order issued in other litigation that compels disclosure of any information or items designated in this action as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL-ATTORNEYS’ EYES ONLY” that party must:

(a) promptly notify the designating party in writing and include a copy of the subpoena or court order;

(b) promptly notify in writing the party who caused the subpoena or order to issue in the other litigation that some or all of the material covered by the subpoena or order is subject to this agreement. Such notification shall include a copy of this agreement; and

(c) cooperate with respect to all reasonable procedures sought to be pursued by the designating party whose confidential material may be affected.

1 8. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

2 If a receiving party learns that, by inadvertence or otherwise, it has disclosed confidential
3 material to any person or in any circumstance not authorized under this agreement, the receiving
4 party must immediately (a) notify in writing the designating party of the unauthorized disclosures,
5 (b) use its best efforts to retrieve all unauthorized copies of the protected material, (c) inform the
6 person or persons to whom unauthorized disclosures were made of all the terms of this agreement,
7 and (d) request that such person or persons execute the “Acknowledgment and Agreement to Be
8 Bound” that is attached hereto as Exhibit A.

9 9. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE PROTECTED
10 MATERIAL

11 When a producing party gives notice to receiving parties that certain inadvertently
12 produced material is subject to a claim of privilege or other protection, the obligations of the
13 receiving parties are those set forth in Federal Rule of Civil Procedure 26(b)(5)(B), except that a
14 party notified that such material has been inadvertently produced shall promptly return or destroy
15 all copies of the inadvertently produced material and confirm in writing to the disclosing party that
16 all such material has been returned or destroyed. Such inadvertent disclosure shall not constitute
17 or be deemed a waiver or forfeiture of any claim of privilege or other protection. This provision
18 is not intended to modify whatever procedure may be established in an e-discovery order or
19 agreement that provides for production without prior privilege review. The parties agree to the
20 entry of a non-waiver order under Fed. R. Evid. 502(d) as set forth herein.

21 10. NON TERMINATION AND RETURN OF DOCUMENTS

22 Within 60 days after the termination of this action, including all appeals, each receiving
23 party must either (i) return all confidential material to the producing party, including all copies,
24 extracts and summaries thereof, or (ii) destroy all such confidential material, copies, extracts, and
25 summaries thereof. The parties shall promptly confirm in writing that all such material has been
26 returned and/or destroyed.

1 Notwithstanding this provision, counsel are entitled to retain one archival copy of all
2 documents filed with the court, trial, deposition, and hearing transcripts, correspondence,
3 deposition and trial exhibits, expert reports, attorney work product, and consultant and expert work
4 product, even if such materials contain confidential material.

5 The confidentiality obligations imposed by this agreement shall remain in effect until a
6 designating party agrees otherwise in writing or a court orders otherwise.

7 IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

8
9 DATED: May 25, 2022

/s/ Gilbert Levy
Attorneys for Plaintiff/Counterclaim-
Defendant

10
11 DATED: May 25, 2022

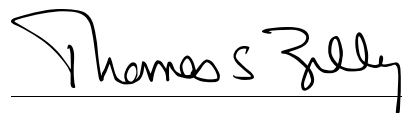
/s/ K. Michael Fandel
Attorneys for Defendants/Counterclaim-
Plaintiffs

12
13
14 **ORDER**

15
16 PURSUANT TO STIPULATION, IT IS SO ORDERED

17 IT IS FURTHER ORDERED that pursuant to Fed. R. Evid. 502(d), the production of any
18 documents in this proceeding shall not, for the purposes of this proceeding or any other federal or
19 state proceeding, constitute a waiver by the producing party of any privilege applicable to those
20 documents, including the attorney-client privilege, attorney work-product protection, or any other
21 privilege or protection recognized by law.

22
23 DATED: May 26, 2022

24
25 

26 Thomas S. Zilly
United States District Judge

EXHIBIT A

ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

I, _____ [print or type full name], of
_____ [print or type full address], declare under penalty of
perjury that I have read in its entirety and understand the Stipulated Protective Order that was
issued by the United States District Court for the Western District of Washington on [DATE] in
the case of *Smack Apparel Company v. Seattle Hockey Partners LLC d/b/a Seattle Kraken et al.*,
Case No. 2:22-cv-00044-TSZ (W.D. Wash.). I agree to comply with and to be bound by all the
terms of this Stipulated Protective Order and I understand and acknowledge that failure to so
comply could expose me to sanctions and punishment in the nature of contempt. I solemnly
promise that I will not disclose in any manner any information or item that is subject to this
Stipulated Protective Order to any person or entity except in strict compliance with the provisions
of this Order.

I further agree to submit to the jurisdiction of the United States District Court for the
Western District of Washington for the purpose of enforcing the terms of this Stipulated Protective
Order, even if such enforcement proceedings occur after termination of this action.

Date: _____

City and State where sworn and signed: _____

Printed name: _____

Signature: _____